Supreme Court, U.S.
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134 (1)

No.

In The
# Supreme Court of the United States

OTIS KIRKLAND, JR., CAROL KIRKLAND AND VIVIAN KIRKLAND,
*Petitioners*,

v.

COUNTY OF WAYNE, ET AL.,
*Respondents*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## PETITION FOR WRIT OF CERTIORARI

OTIS KIRKLAND, JR., *pro se*
CAROL KIRKLAND, *pro se*
VIVIAN KIRKLAND, *pro se*
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## QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE LOWER COURT ERRED WHEN IT DISMISSED THE CORPORATION, AND ITS MAJORITY OWNER'S NOTICE OF APPEAL BECAUSE IT HAD BEEN SIGNED AND FILED BY A NON-ATTORNEY CORPORATE EMPLOYEE WHO WAS AUTHORIZED TO ACT ON BEHALF OF THE CORPORATION AND ITS OWNERS?

2. WHETHER THE CIRCUMSTANCES ATTENDANT TO THE FILING OF THE NOTICE OF APPEAL CONSTITUTE *"EXCUSABLE NEGLECT"* OR GOOD CAUSE SUCH AS TO PERMIT LATE FILING?

## PARTIES TO THE PROCEEDING

The individual Petitioners, in this consolidated proceeding, are members of the Kirkland Family. Otis and Carol are husband and wife, and Vivian is their daughter-in-law. Audio Visual Equipment and Supplies, a small closely held Michigan Corporation, is wholly owned by Vivian and Carol Kirkland, and managed by Otis Kirkland, who generally performs any tasks necessary to promote corporate interest.

Respondents are The County of Wayne, Edward H. McNamara, Brendan Dunleavy, Rosalyn Gibson, Herman G. Petzold, III, Clarence McNeal, in his individual and official capacity of Purchasing Director, Conrad Renteria, Andrew Soves, Victoria C. Innis, John Snider, Linda Pearson, Earl D. Ollila, and Lynn Lesnick, Jointly and Severally.

## RULE 29.6 STATEMENT

There is no parent or publicly held company owning 10% or more of the stock of Audio Visual Equipment and Supplies.

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## OPINIONS BELOW

On October 4, 2008, in an unreported order, the Court of Appeals dismissed the appeal by Vivian Kirkland and Audio Visual Equipment. (Apx. A, pp. 1a-3a.)

On December 23, 2008, in an unreported order, the Court of Appeals denied a motion for reconsideration. (Apx. B, pp. 4a-6a.)

## JURISDICTION

The Order of the Court of Appeals dismissing the appeal as to two of the Plaintiffs, i.e., Vivian Kirkland and Audio Visual Equipment was entered on December 23, 2008. The Notice of Appeal was filed on February 7, 2008. This Court has jurisdiction pursuant to *28 U.S.C. § 1254(1).* An application to extend the time to file a petition for a writ of certiorari was granted extending the time to file until May 22, 2009.

## STATEMENT OF THE CASE

### I. BACKGROUND FACTS AND ISSUES

#### The Parties and Their Relationship

Audio Visual Equipment & Supplies, Inc. ("AVE") a Michigan close corporation, which is owned and operated by the Kirkland family, is functionally the alter ego of the Kirkland Family. AVE is a supplier of goods to customers, including the County of Wayne. *[District Court Docket Entry No. 1, ¶¶ 5-6].* AVE had been a supplier of goods to Wayne County for approximately eight years. *[District Court Docket*

*Entry No. 1, ¶ 11].* AVE is owned by Carol Kirkland and Vivian Kirkland. *[District Court Docket Entry No. 1, ¶¶ 7,12,14].* Otis Kirkland is employed by AVE, and performs many functions for AVE. *[Docket Entry No. 1, ¶ 13].* AVE's owners testified that Otis Kirkland, Carol's husband and Vivian's father-in-law, is the individual most knowledgeable of the facts underlying Petitioners' allegations in this lawsuit, and that he is authorized to speak and testify on behalf of AVE. *(Vivian Kirkland Dep. TR., p. 91; Carol Kirkland Dep. TR., pp. 80-81).* He was also specifically authorized to sign and file the Notice of Appeal at issue herein, on behalf of the closely held family owned corporation, and on behalf of Vivian, his daughter-in-law and majority owner. Carol, who was with Otis when he completed and filed the Notice of Appeal, paid the filing fee with a personal check. (*See* Apx. E, p. 14a.)

This lawsuit arises out of Petitioners' allegations that the named Respondents unlawfully deprived Petitioners of public contracts that Petitioners bid on, denied Petitioners the opportunity to bid on other contracts, and unlawfully initiated debarment proceedings against them. *[Docket Entry No.1, Introduction pp. 2-4].* Petitioners were being punished, and made an example of, for declining to engage in a *"pay to play"* contracting environment which Petitioners allege existed under the then incumbent county executive.

**The Instant Lawsuit**

On February 28, 2006, Petitioners filed their Complaint against Wayne County and ten current and former County employees and elected officials, in which Petitioners alleged, *inter alia*, that Respondents

are liable to them under (1) *42 U.S.C. § 1983* for an unlawful conspiracy to deprive Petitioners of contracts based on racial animosity *(Count I - Complaint, ¶¶ 75-76);* (2) *42 U.S.C. § 1981* for discriminating against Petitioners based on their race; to impair Otis Kirkland's employment contract with AVE *(Count II - Complaint, ¶ 81,85);* (3) *42 U.S.C. § 1983* for violating Petitioners' due process and equal protection rights guaranteed under the U.S. Constitution by depriving them of their property interest in their contracts with Wayne County *(Count III - Complaint, ¶ 87*; (4) for depriving them of the equal protection of the laws guaranteed to them under the U.S. Constitution *(Count V-Complaint, ¶¶ 98-102);* (5) for common-law invasion of privacy *(Count VI - Complaint, ¶¶ 108-111)*; (6) for violating their due process rights under the United States and Michigan constitutions; and (7) for violating their substantive due process rights under the United States Constitution.

This case has a state court antecedent, and was also an administrative debarment proceeding in Wayne County, which still remains open after 8 years. Mistreatment at the hands of the county and its officials has been contested by the Kirkland family for over 8 years in administrative proceedings, and in Michigan courts.

The gravamen of Petitioners Complaint is that Respondents, while acting under color of law conferred by their status as officials, agents, or employees of Wayne County, individually and in concert, acted so as to impair Petitioners' ability to make and enforce contracts in violation of *42 U.S.C. § 1981*, to impede, deny, or prevent AVE from doing business with Wayne County in violation of *42 U.S.C. §§ 1981, 1983*, and

*1985*, to prevent Otis Kirkland from making and enforcing contracts with Wayne County on behalf of AVE, in violation of *42 U.S.C. §§ 1981 and 1985*. Petitioners contend that Respondents have misused their power, and authority, which they hold under color of state law, in an arbitrary, capricious, malicious and unlawful manner, to violate Petitioners' constitutional rights. The acts complained of herein were done by Respondents, intentionally and with malice, to cause the Kirklands' emotional and financial distress.

Respondents have also interfered with advantageous contractual relationships enjoyed by AVE. Respondents colluded to prevent Petitioners from earning a living, insofar as revenues earned from doing business with Wayne County, pursuant to servicing competitively awarded contracts for various goods, contributed to their livelihood. The activities complained of violate Petitioners' liberty interest, protected by the *14th Amendment*, in their right to earn a living.

Respondents have refused, without good reason or legal grounds, to deal honestly or fairly with AVE or the Kirklands, have breached existing contracts, and have gone to great lengths to avoid informing AVE of contracts being let for bids. In addition, Respondents have refused to consider bids submitted by AVE, or in the rare (of late) case where a bid was awarded, the county, through pretext, ruse, dissembling, or other untruthful or devious means, has prevented AVE from performing under existing contracts, and reaping any profits to be made by completion.

The Respondents misused their authority, as county officials, to commence baseless debarment proceedings, which they never intended to carry to final disposition, and which remain open to date. According to remarks by Mr. Petzold, the assistant Wayne County Corporation counsel, who was point man on the initial debarment proceedings against AVE, they were filed primarily in order to drain Petitioners' financial resources by forcing them to incur ruinous legal expenses in order to defend against the spurious proceedings. The Affidavit by Mr. Dunleavy, the Wayne County Auditor General, confirms that the impetus to go after AVE came directly from Mr. McNamara. The affidavit of Rosalind Gibson, Deputy Auditor General, confirms that she initiated an investigation of AVE pursuant to orders from Mr. Dunleavy. *See* Apx. D, pp. 10a-13a. Rather than honor existing contracts, the Respondents refused to place orders, or accept deliveries, or returned goods without a valid basis and in violation of procedures or timetables previously agreed to or followed by the parties. Such actions, which were taken under color of law but for improper purposes, violated Petitioners rights under *42 U.S.C. § 1981(a).* Respondents have concocted spurious reasons for not honoring contracts, or for rejecting goods from AVE. Respondents, have acted intentionally in order to vex, harass, annoy, distract, defame, harm financially, or for other improper motives wholly unrelated to any failure to perform on Plaintiff's part, as to any contract for goods or services that AVE ever had with Wayne County. The wrongful actions have violated Plaintiff's civil rights, cost Petitioners a great deal of money, and has caused deep mental anguish to the Kirkland family, which has now lasted for 8 years, with no end in sight.

On November 27, 2007, the district court issued its order granting Respondents Summary Judgment as to all of Petitioners' claims. Petitioners thereafter dismissed their attorney Mr. Whitfield, after which the District Court permitted counsel to withdraw. Petitioners were thereafter unrepresented by counsel, and were without guidance. There was a very tight deadline to file their Claim of Appeal. There is no indication of record that they were informed by withdrawing counsel, or the Court, of the tight deadlines, nor of the manner in which to file a Notice of Appeal.

## II. DECISION OF THE DISTRICT COURT

The District Court granted Summary Judgment as to all of Petitioners claims on November 27, 2007. On December 7, 2007, Petitioners filed a Motion for Reconsideration that was denied on January 18, 2008. A Motion for Recusal was denied on the ground that the Court lacked jurisdiction over it and also over any *Rule 60(b)* motions that Petitioners might file.

## III. DECISION OF THE SIXTH CIRCUIT

On October 24, 2008, the Court of Appeals dismissed the appeal *"as to Vivian Kirkland and AVES, which was taken from the lower Court order of January 18, 2008." See* Apx. A., pp. 1a-3a. Said order denied Petitioners Motion for Reconsideration of the district court's order of November 27, 2007 which granted summary judgment on four motions filed by Defendant, while a motion for leave to amend their Complaint was pending. The Sixth Circuit, however retained jurisdiction over the appeal of Otis and Carol Kirkland, while dismissing the Notice as to Vivian and

AVE on the ground of untimeliness, and because Otis, who is not an attorney, could not file a Notice of Appeal on behalf on AVE.

## REASONS FOR GRANTING THE PETITION

Appellants, the Kirkland Family, respectfully submit that there are sound reasons why this Court should grant its Petition for Writ of Certiorari and review the Sixth Circuit's decision, the effect of which was to prevent the family owned business which has suffered greatly due to Respondents' wrongful behavior committed under color of law over the past 8 years, from pursuing its claims before the federal Court. Similarly, the decision also prevented Vivian Kirkland, the majority owner, from pressing her claim against the county, and other Respondents.

First, there is a conflict between the circuits on the question whether as occurred herein, a Notice of Appeal signed and filed by a corporate officer, or as in our case, employee, who is not an attorney, is invalid? The First, Fifth, Ninth and Tenth hold that the notice is valid, and confers jurisdiction. The Sixth Circuit takes a contrary view. This Court has not addressed the precise issue. As the Sixth Circuit and other Circuits have recognized, *FRAP Rules 3 and 4* tolerate a *"common sense approach to timely filing and do not insist upon literal compliance in cases in which it cannot be fairly exacted,"* and there is no prejudice to opposing parties.[1] Considerations of fairness dictate

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[1] *What Constitutes "Excusable Neglect" Which Will Permit Federal District Court to Extend Time for Filing Notice of Appeal from Civil Judgment under Rule 4(a) of Federal Rules of Appellate*

that a strict literal compliance is not always required, and a commonsense approach permitting filing is required, when a well intended, good faith, and unequivocal, effort to comply has been made. Where there is no prejudice as to the Appellee, then the Notice of Appeal should not be dismissed. This is particularly so when excusable neglect prevented the timely filing.

Secondly, after having been dismissed, Petitioners' attorney was discharged by the Court after Judgment was entered but before a Notice of Appeal was filed. In the very brief window, Petitioners were without counsel or advice as to how to proceed in order to perfect their appeal. Cases from other circuits have held that the failure timely to file a Notice of Appeal under such circumstances falls within the *"excusable neglect"* exception, and can be cured retroactively.

## I. THE CIRCUITS ARE SPLIT

### A. There Is an Acknowledged Split among the First, Fifth, Sixth, Ninth and Tenth Circuit Courts of Appeal as to Whether a Corporate Officer Who Is Not an Attorney May Sign and File a Notice of Appeal on Behalf of the Corporation.

The Notice of Appeal which was signed and filed by a corporate employee in the presence of Carol Kirkland, his wife, one of its co-owners, is valid despite not having been signed and filed by counsel, and

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*Procedure and under Former Rule 73(a) of Federal Rules of Civil Procedure, 26 ALR Fed 569.*

therefore conferred jurisdiction in the court of appeals. Carol paid the filing fee with a personal check. *See* Apx. E., p. 14a. The Notice of Appeal herein was filed by Mr. Kirkland on behalf of AVES, his daughter-in-law Vivian (majority owner of the business), his wife Carol (the minority owner) and himself. Said owners of the closely held corporation, Plaintiffs throughout the life of the case, had designated Otis Kirkland as spokesperson or the best qualified to act on behalf of AVE. The County has always been clear on this point. *See, V. Kirkland Dep Tr., p. 91; C. Kirkland Dep Tr., pp. 80-81* After the district court granted summary judgment against the Kirklands and AVES, they dismissed their attorney, and so were unrepresented during the time in which their claim of appeal had to be filed. Unable to locate appellate counsel before the deadline to file an appeal had passed, with authority granted, Mr. Kirkland filed a Notice of Appeal on behalf of all parties, including AVES. To all appearances, the notice was properly filed and treated accordingly by the clerk's office in Cincinnati.

Respondents challenged the notice as to AVES on the ground that it was defective because Mr. Kirkland was not a lawyer and could not represent AVES. The argument is wholly without merit because filing a *pro se* Notice of Appeal for a corporation, with authority granted by its officers, is not practicing law, or representing a corporation in Federal Court. Mr. Kirkland is not a lawyer, and did not purport to represent AVES in Federal Court. Accompanied by his wife, the minority owner, he merely filed a Notice of Appeal on behalf of AVES and his daughter-in-law, who was majority owner and who had granted him authority to file on her behalf and also AVES'.

The precise question, i.e., whether a corporation's Notice of Appeal was invalid because it was signed and filed by a corporate officer or, as herein, employee (who was not an attorney) has been decided in Petitioners' favor in at least four other circuits. The Ninth Circuit Court of Appeals reasoned *In re Bigelow, 179 F.3d 1164 (9th Cir. 1999)* as follows:

> The law is clear that a corporation can be represented only by a licensed attorney. [citation omitted] However, nothing in . . . the Federal Rules of Appellate procedure requires dismissal of an appeal when a corporate officer signs the Notice of Appeal for the corporation. A Notice of Appeal is just that - - a notice. It is not a motion or a pleading. *See, Rule 7, Federal Rules of Civil Procedure*. We fail to see any compelling reason to refuse to recognize a corporation's Notice of Appeal, signed and filed by a corporate officer, so long as a lawyer promptly thereafter enters a formal appearance on behalf of the corporation and undertakes the representation. *K.M.A., Inc. v General Motors Acceptance Corp., 652 F.2d 398, 399 (5th Cir. 1981).*

*(emphasis added).*

The First Circuit, which subscribes to a similar view reasoned as follows in *Instituto de Educacion Universal Corp v U.S. Dept. of Education, 209 F.3d 18, 22 (1st Cir 2000)*:

> *It is a close question as to whether a Notice of Appeal signed by a corporate officer has force with respect to the corporation. On reflection,*

*however, we answer that question affirmatively. Corporations, unlike natural persons, can act only through agents. Moreover, appeal periods are notoriously brief and . . . a corporate litigant whose counsel dies, becomes disabled, or withdraws at an inopportune time would be powerless to perfect an appeal. While it is true that a non-lawyer may not represent a corporation in ongoing proceedings, see In re Las Colinas Dev. Corp., 585 F.2d 7, 13 (1st Cir. 1978), we believe that a valid distinction can be drawn between ongoing legal representation and the essentially ministerial action involved in the filing of a Notice of Appeal . Thus, we hold that a corporate officer may sign and file a Notice of Appeal on behalf of the corporation, as long as the corporation then promptly retains counsel to take up the cudgels and prosecute the appeal. Accord Bigelow v Brady, 179 F.3d 1164, 1165-66 (9th Cir. 1999) ("We fail to see any compelling reason to refuse to recognize a corporation's Notice of Appeal, signed and filed by a corporate officer, so long as a lawyer promptly thereafter enters a formal appearance on behalf of the corporation and undertakes the representation.") K.M.A., Inc v GMAC, 652 F.2d 398, 399 (5th Cir 1981) (similar). That condition is satisfied here.*

The law in the Tenth Circuit is in accord with that in the First and Ninth. *See Harrison v Wahatoyas, LLC, 253 F.3d 552, 557 (10th Cir. 2001):*

*We find the reasoning of these cases persuasive and thus fail to see any compelling reason to refuse to recognize a corporation's Notice of Appeal , signed and filed by a corporate officer,*

> *so long as a lawyer promptly thereafter entered a formal appearance on behalf of the corporation and undertakes the representation.*

*Bigelow, 179 F.3d at 1165; accord, Harrison 253 F.3d at 557.* Mr. Kirkland, a corporate employee, who was authorized to do so, signed and filed a Notice of Appeal on behalf of AVES, and all other members of his family on November 7, 2008. The clerk's office docketed the appeal and advised Mr. Kirkland to have counsel, as soon as one was retained, to contact the court regarding the appeal. *See Court of Appeals Docket Entry dated March 4, 2008.* On March 17, 2008, Mr. Kirkland complied with the clerk's instructions to provide the court with the name of any attorney who would be representing the Appellants.[2] Mr. Nutt, an attorney, filed an Appearance on behalf of all Petitioners shortly thereafter.[3] As far as Petitioners knew, and without any indication from the clerk to the contrary, they had done everything necessary to file an appeal. Indeed, the clerk's instructions were consistent with the law in the 1st, 5th, 9th and 10th Circuits.

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[2] Where omission occurs because party has been misled by action of court or one of its officers, such neglect may be excusable. *See, Hernandez-Rivera v Immigration & Naturalization Service, 630 F.2d 1352 (9th Cir. 1985); Mennen Co. v Gillette Co., 719 F.2d 568 (2d Cir 1983).*

[3] In a very brief period of representation, i.e., 30 days and with precious little to show for all of the time billed, counsel has billed petitioners the sum of $ 3,000 exclusive of any work on this petition, which we have been forced to tackle on our own because we simply cannot afford to pay the sort of fees we are being billed. Given more time, we will locate affordable Appellate counsel to handle our claims.

Mr. Whitfield could not have signed the notice because he had been dismissed by Petitioners and discharged by the Court. Therefore he lacked authority to act on Petitioners' behalf. *Edlund v Los Altos Builders, 106 Cal. App. 2d 350, 235 P.2d 28 (1951)* Moreover, the Notice of Appeal form that Mr. Kirkland completed, signed, and filed on 2/7/08 indicates that he did so in a representative capacity as to AVES because the business address, telephone number and email address are set forth on the Notice. Also, the form itself is not a model of clarity. Where it says name of parties, the addition of a simple phrase, "or parties" would put *pro se* litigants on notice, perhaps, that other Petitioners should also be listed. And there is only room for one signature.

*FRAP 3(b)(1) and (c)(2)-(3)* and in particular *(4)* evinces a strong policy that favors preservation of the right to Appeal.

> *(4) An appeal must not be dismissed for informality of form or title of the Notice of Appeal , or for failure to name a party whose intent to appeal is otherwise clear from the Notice.*

Federal Rule of Civ P 11(a) further demonstrates the policy in favor of matters being heard on their merits because, while it requires papers filed with the court to be signed by an authorized person, it cannot strike an unsigned paper unless the party, after having the omission called to his/her attention, did not promptly correct it. The 1993 Amendments to subdivision (a) makes clear that the policy is strongly favored. *"Unsigned papers are to be received by the Clerk . . .", but may be "stricken if the omission of the*

*signature is not corrected promptly after being called to the attention of the . . . pro se litigant. Correction can be made by signing the paper on file or by submitting a duplicate that contains the signature."* No one ever called any omission to Petitioners' attention as Rule 11(a).

Thus, the rules appear to impose upon the Clerk a clear duty to call any omitted signature, where one is necessary, to the attention of the *pro se* litigant. And this is where papers noticing an appeal must be signed. There is no requirement in the *Federal Rules of Appellate Procedure* that all Petitioners sign a Notice of Appeal. Under *Rule 3(c)(2)*, the policy of leniency in favor of preservation of the right of appeal is once more reflected because it recognizes that a spouse may file on behalf of his wife and family. In this case, Otis, Vivian's father-in-law, who was also authorized to file on her behalf as well as that of the Corporation, signed and filed the notice. Since the cases suggest that a person may be authorized to file on behalf of another, and that notice is valid absent indications to the contrary, Mr. Kirkland's signature was sufficient as to all Plaintiffs. Sub-paragraph (4) prohibits dismissal " . . . *for failure to name a party whose intent to appeal is otherwise clear from the notice."* Vivian has not suggested that she objects to her father-in-law having filed a Notice on her behalf, and that of the corporation in which she is the majority shareholder, and her mother in law, Carol is the sole minority shareholder.

Mr. Kirkland was authorized to sign and file a notice on his behalf, and that of his spouse, Carol, by operation of *FRAP 3(c)(2)*, and on behalf of Vivian and AVES by express verbal authority. Accordingly, no

lawful basis existed to dismiss the Notice of Appeal as to the corporation and Vivian. Yet, that is exactly what the Sixth Circuit did in its order appealed from herein.

With all due respect to the Clerk, Petitioners suggest that he conflated the filing of a Notice of Appeal with actually representing the corporation in federal court, which is clearly proscribed in the Sixth Circuit. *See, e.g., U.S. v 919 Acres of Land, 416 F.2d 1244 (6th Cir 1969) (a corporation cannot appear otherwise than through an attorney); Ginger v Cohn, 426 F.2d 1385, 1386 (6th Cir 1970).* To the extent the dismissal states controlling law in the 6th Circuit, it is in direct conflict with that of the First. *See, e.g., Instituto de Educacion Universal Corp v U.S. Dept of Education, 209 F.3d 18 ("We hold that a corporate officer may sign and file a Notice of Appeal on behalf of the corporation.") p. 22;* the Ninth, *In Re Bigelow, 179 F.3d 1164 (9th Cir 1999),* which holds that a Notice of Appeal is not a pleading nor a motion, and there is no basis for refusing to recognize notice when counsel for corporation entered his appearance of record before any briefs, motions, or responses were due. *A corporation's Notice of Appeal signed and filed by a corporate officer, is valid even though it is not signed and filed by counsel*; and the Tenth, *Harrison v Wahatoyas, LLC, 253 F.2d 552;* the Fifth, *In re K.M.A., Inc., 652 F.2d 398 (5th Cir 1981) ("it is not clear, however, whether the filing of the corporation's Notice of Appeal by someone who is not an attorney is sufficient to divest this Court of its jurisdiction to consider this appeal").*

Accordingly, the Notice of Appeal signed and filed by Mr. Kirkland on behalf of all Petitioners with their express consent was valid. Therefore jurisdiction over

the appeal as to AVES lies under the holding in *Bigelow v Brady (In re Bigelow), 179 F.3d 1164, 1165 (9th Cir 1999) (a Notice of Appeal is not a pleading) citing Fed. R. Civ. P. 7). See also, Becker v Montgomery, 532 U.S. 757, 121 S.Ct 1801 (2001) ("(i)mperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court.")*

**B. The Discharge of Petitioner's Attorney Immediately after Summary Judgment Was Granted Against Them, Coupled with Their Inability to Locate Replacement Counsel to Assist with Post Judgment Proceedings, and Their Unfamiliarity with the Proper Procedures or Methods for Perfecting a Notice of Appeal, Constituted Excusable Neglect or Good Cause to Permit Late Filing of the Appeal**

If the Notice of Appeal filed by Carol and Otis Kirkland on behalf of the corporation (copy of cancelled check and receipt #200 567246 from U.S. District Court, dated February 2, 2009, *see* Apx. E, p. 14a) and his daughter-in-law is deemed invalid, their reliance upon the actions of the clerk's office should constitute excusable neglect and permit a notice with nunc pro tunc effect to be filed upon remand. Once summary judgment had been entered, and trial counsel dismissed, the Kirklands were without representation. After having fought for so long, they were not about to accept defeat until all possible avenues had been exhausted. The search for replacement counsel commenced immediately, but time was running. Fearful lest their right to appeal be lost while

searching for a new lawyer, Petitioners did what they could, as best they could, to protect their right to appeal, by filing the Notice of Appeal at issue herein. Once the notice was filed, the Clerk proceeded as if all was in order, except that Appellate counsel had to enter an Appearance. Petitioners relied upon the clerk's actions, and followed his instructions to the letter.[4] In *Pioneer Investment Services Co. v Brunswick Associates Ltd. Partnership, 507 U.S. 380, 113 S.Ct. 1489 (1993)*, this Court established a test for evaluating whether neglect is excusable so as to permit late filing of a Notice of Appeal . The four factors are: *(1) the danger of prejudice to the non-moving party, (2) the length of delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the moving party's conduct was in good faith.*

If we examine the factors, in light of the facts of our case, it becomes apparent: (1) there is absolutely no danger or prejudice to the non-moving party. Given the

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[4] *In Re Cosmopolitan Aviation Corp., 763 F.2d 507 (2d Cir. 1985) (The excusable neglect standard will generally be satisfied where a party acting in good faith was entitled to and did rely on actions of the district court of its officers and consequently misses the Rule 4 deadline. E.g., Mennen Co., 719 F.2d at 571); Rowland v California Men's Colony, 506 U.S. 194, 201-02, 113 S. Ct. 716 (1993) ("It has been the law for the better part of two centuries . . . that a corporation may appear in federal court only through licensed counsel." ); Commercial & R.R. Bank of Vicksburg v Slocomb, Richards & Co., 39 U.S. (14 Pet.) 60, 65 (1840) ("[A] Corporation cannot appear but by attorney . . . . ); Osborn v Bank of the United States, 22 U.S. (9 Wheat.) 738, 830 (1824) ("A corporation, it is true, can appear only by attorney, while a natural person may appear for himself.").*

relationship between the parties and the unceasing battle that Petitioners have waged against the county over the past eight years, there was no uncertainty as to its continuance. Further, since the Notice of Appeal was effective as to Otis and his wife, Carol, the county has to defend an appeal. Since the parties are already before the Court there will be no prejudice if it has to defend against AVE and Vivian as well on the same claims, or facts. (2) There was not any delay because the notice was timely filed. The problem is a technical one, i.e., was the notice, while valid as to Otis and Carol, invalid as to the corporation and Vivian? (3) The reason for the delay, which was not within the reasonable control of the Petitioners, is that Petitioners were misled into believing that their Notice of Appeal had been perfected by the actions of the Sixth Circuit Clerk's office. (4) Petitioners' conduct was in good faith. Petitioners have been waging their battle for a very long time, and fully intend to see it through to some final disposition on the merits if at all possible. The *pro se* Notice of Appeal had one purpose, i.e., to preserve the right to appeal as to all stakeholders in the family owned and operated close corporation. The Petitioners' reliance upon the Clerk's actions was in good faith.

Petitioners meet the *Pioneer* test and should, therefore, be permitted to file the Notice of Appeal as to AVE, and Vivian on a nunc pro tunc basis, if the Court ultimately concludes that the notice already filed was invalid as to them.

## II. THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE OR CLARIFY AN IMPORTANT QUESTION OF FEDERAL LAW

The Petitioners are in an uncharted place where their ability to vindicate their substantial rights to an appeal are subject to a ruling which has invalidated the appeal of the family owned and operated corporation, and its majority shareholder. The Sixth Circuit ruling is at variance with rulings from at least four other circuits which, beyond dispute, would permit Otis, a designated corporate employee, and non-attorney, to file a Notice of Appeal on behalf of AVE. What law is to govern? The outcome will vary, depending upon the circuit. Will varying outcomes on the same question of law continue to be permitted, depending upon circuit, to the effect that appeals which should be handled in a consistent manner, are not. Rather, the ability of litigants to vindicate their rights will continue to depend on the circuit in which they reside. The rights will be subject to vindication in the First, Fifth, Ninth and Tenth Circuits, which all permit a non-lawyer corporate officer, or employee such as Otis, to file a Notice of Appeal because, unlike the Sixth, they do not regard a mere act of signing and filing a Notice of Appeal on behalf of a corporation, as practicing law.

Further, the application of the *Excusable Neglect Doctrine* needs to be clarified in a case where unrepresented litigants who are under extreme time pressure to file their Notice of Appeal, manage to do so and rely upon signals from the Clerk's office, that all is in order until, it is too late. In this regard, Clerks will benefit from clarification as much as litigants. Further, there needs to be a clarification as to whether

the Courts have a duty to inform unrepresented or *pro se* litigants of their rights to appeal and also of the very tight deadline for doing so.

## CONCLUSION

For all of the reasons set forth above, the Kirkland family respectfully submits that the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

Otis Kirkland, Jr., *pro se*
Carol Kirkland, *pro se*
Vivian Kirkland, *pro se*
25325 Shiawassee Circuit, Ste. 203
Southfield, Michigan 48033
(248) 746-0007

Joel H. Kaufman, Esq.
*Counsel of Record for*
*Audio Visual Equipment*
*& Supplies, Inc.*
31275 Northwestern Hwy.
Ste. 140
Farmington Hills, MI 48334
(248) 851-3171

Dated: May 21, 2009

# APPENDIX

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**No. 08-1267**

**[Filed October 24, 2008]**

AUDIO VISUAL EQUIPMENT & SUPPLIES, INC.; VIVIAN KIRKLAND,

Plaintiffs,

OTIS KIRKLAND; CAROL KIRKLAND,

Plaintiffs-Appellants,

v.

COUNTY OF WAYNE, et al.,

Defendants-Appellees.

Before: KEITH, COLE, and COOK, Circuit Judges.

The district court entered summary judgment for the defendants in this civil rights action on November 27, 2007. The plaintiffs filed a timely motion for reconsideration, which was denied on January 18, 2008. On February 7, 2008, Plaintiff Otis Kirkland filed a *pro se* notice of appeal, purportedly on behalf of

all of the plaintiffs. The defendants have filed a motion for an order requiring that Plaintiffs Audio Visual Equipment & Supplies, Inc. ("AVES"), Carol Kirkland, and Vivian Kirkland obtain permission to appeal. The plaintiffs oppose the motion. The defendants move to strike the plaintiffs' reply to their reply as not authorized by the rules. The plaintiffs oppose the motion to strike.

The notice of appeal is captioned "Audio Visual et al v. Wayne Countyet al" and states that Audio Visual et al. appeals from the judgment. The notice is signed *pro se* by Otis Kirkland. The notice of appeal is sufficient to perfect an appeal by Otis Kirkland and his wife, Carol Kirkland. *See* Fed. R. App. P. 3(c)(2). Plaintiff Vivian Kirkland, Otis Kirkland's daughter-in-law, does not fall within the ambit of Rule 3(c)(2). Plaintiff AVES, as a corporation, may not be represented in court by a non-attorney officer, shareholder, or employee. *Taylor Steel, Inc. v. Keeton*, 417 F.3d 598, 603 (6th Cir. 2005) (noting that "neither a corporate officer nor a shareholder may appear on behalf of the corporation"); *see also Rowland v. Cal. Men's Colony*, 506 U.S. 194, 201-02 (1993) (stating that "[i]t has been the law for the better part of two centuries, for example, that a corporation may appear in the federal courts only through licensed counsel"). Because neither Vivian Kirkland nor AVES filed a timely notice of appeal, the court lacks jurisdiction over their appeal.

The defendants' motion to strike is **DENIED**. The appeal by AVES and Vivian Kirkland is **DISMISSED** for lack of jurisdiction. The appeal will proceed on behalf of Otis and Carol Kirkland.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**No. 08-1267**

**[Filed December 23, 2008]**

AUDIO VISUAL EQUIPMENT & SUPPLIES, INC.; VIVIAN KIRKLAND,

Plaintiffs,

OTIS KIRKLAND; CAROL KIRKLAND,

Plaintiffs-Appellants,

v.

COUNTY OF WAYNE, et al.,

Defendants-Appellees.

Before: KEITH, COLE, and COOK, Circuit Judges.

On October 24, 2008, the court dismissed this appeal as to two of the plaintiffs because the *pro se* notice of appeal filed by Plaintiff Otis Kirkland was not sufficient to perfect an appeal on their behalf. The plaintiffs move for reconsideration of the October 24 motion and move for leave to file the motion for

reconsideration out of time. The defendants oppose the motion for reconsideration.

The plaintiffs attempted to file electronically the motion for reconsideration on November 3, 2008, which was ten days after the entry of the partial dismissal. An addendum to the motion for reconsideration was filed on November 4, 2008. Because the wrong entry code was used, counsel was instructed to redocket the motion for reconsideration. The motion was refiled on November 12, 2008. Under the circumstances, the motion for leave to file the motion for reconsideration out of time will be granted.

In seeking reconsideration, the plaintiffs argue that Plaintiffs Audio Visual Equipment & Supplies, Inc. ("AVES") and Vivian Kirkland functionally complied with the requirements of Fed. App. P. 3(c) based on two entries made by the case manager on the appellate docket sheet on March 4, 2008. To be timely, a notice of appeal by these parties had to be filed by February 19, 2008. Moreover, "a notice of appeal must specifically indicate the litigant's intent to seek appellate review." *Smith v. Barry*, 502 U.S. 244, 248 (1992); *see also United States v. Means*, 133 F.3d 444, 450 (6th Cir. 1998). AVES and Vivian Kirkland did not file anything in either the district court or this court, within the time period for filing an appeal, indicating their intent to seek appellate review. *See Persyn v. United States*, 935 F.2d 69, 72 (5th Cir. 1991) (noting that the "fortuitous decision of the district court clerk to include all of the original plaintiffs in the docketing statement does not release the landowners from the requirements of Rule 3(c)").

The motion for leave to file the motion for reconsideration out of time is **GRANTED**. The motion for reconsideration of the order dismissing the appeal as to AVES and Vivian Kirkland is **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

## APPENDIX C

**STATE OF MICHIGAN**
**IN THE CIRCUIT COURT**
**FOR THE COUNTY OF WAYNE**

**No. 01-137624 CZ**

**[6th Cir. 08-1267 ROA pgs. 680-681]**

AUDIO VISUAL EQUIPMENT )
AND SUPPLIES, INC. )
)
Plaintiff, )
)
vs )
)
COUNTY OF WAYNE, )
)
Defendant. )
)

[List of Counsel omitted here]

AFFIDAVIT OF BRENDAN G. DUNLEAVY, WAYNE COUNTY AUDITOR GENERAL

STATE OF MICHIGAN )
)ss
COUNTY OF WAYNE )

Brendan G. Dunleavy, first being sworn, deposes and says:

1. I am presently employed by Wayne County as its Auditor General.

2. As Wayne County Auditor General, I am appointed by the Wayne County Board of Commissioners.

3. In my capacity as Legislative Auditor General, I preside over an audit staff which assist me in carrying out my duties.

4. Among my responsibilities is the performance of independent audits at the direction of the Wayne County Board of Commissioners and other elected officials.

5. I was directed by the County Chief Executive Officer to investigate the contracting practices of Audio Visual Supplies and Equipment, Inc. ("AVE").

6. I appointed Rosalyn Gibson, Senior Principal Auditor, to perform this investigation of AVE.

7. During the course of Ms. Gibson's investigation, Vivian Kirkland was identified as a shareholder of AVE and, on information and belief, Otis Kirkland, Jr., as its co-owner and chief operating officer through which AVE conducts all of its business.

8. After reviewing that information, I directed Ms. Gibson to include Vivian and Otis Kirkland in her investigation of AVE and its principals.

9. Upon the completion of Ms. Gibson's investigation of AVE, I turned over the results of the investigation to the Wayne County Corporation Counsel and recommended that debarment proceeding commence pursuant to the Wayne County Ordinance that authorizes debarment of vendors.

10. At no time during the course of the investigation or since have I discussed AVE or its principals with Walter Beard, Wayne County Director of Purchasing, or any of his staff.

The foregoing statement is based upon my personal knowledge and if called to testify I could competently testify to all of this statement.

Dated: 4-22-02

/s/ Brendan G. Dunleavy
Brendan G. Dunleavy
Wayne County Auditor General

Subscribed and sworn to before me on
this 22 day of April, 2002.

Notary Public /s/
County of Wayne, State of Michigan
My Commission Expires 2-17-04

## APPENDIX D

**STATE OF MICHIGAN**
**IN THE CIRCUIT COURT**
**FOR THE COUNTY OF WAYNE**

**No. 01-137624 CZ**

**[6th Cir. 08-1267 ROA pgs. 683-685]**

| | |
|---|---|
| AUDIO VISUAL EQUIPMENT AND SUPPLIES, INC. | ) |
| Plaintiff, | ) |
| vs | ) |
| COUNTY OF WAYNE, | ) |
| Defendant. | ) |

[List of Counsel omitted here]

AFFIDAVIT OF ROSALYN GIBSON,
SENIOR PRINCIPAL AUDITOR,
OFFICE OF THE WAYNE COUNTY
LEGISLATIVE AUDITOR GENERAL

STATE OF MICHIGAN )
)ss
COUNTY OF WAYNE )

Rosalyn Gibson, first being sworn, deposes and says:

1. I am presently employed by Wayne County as a Senior Principal Auditor in the Office of the Wayne County Legislative Auditor General.

2. Among my duties is to conduct investigations at the direction of Brendan Dunleavy, the Auditor General, his deputy or a senior manager.

3. I was directed to conduct a investigation of the contracting practices of a vendor identified as Audio Visual Supplies and Equipment, Inc. ("AVE").

4. During the course of my investigation, I ascertained from corporate records files with the State of Michigan that a shareholder and the president of AVE was Vivian Kirkland.

5. Based upon a review of Wayne County records and correspondence and interviews of County employees who do business directly with AVE, I ascertained that Otis Kirkland, Jr., represented AVE exclusively when doing business with Wayne County and consequently, I formed the belief that Mr. Kirkland was the defacto, if not dejure, owner of AVE.

6. I reported my findings to the Auditor General who subsequently directed me to include Vivian and Otis Kirkland, Jr., in the scope of my investigation.

7. In the course of my investigation, I interviewed employees in the Wayne County Purchasing Department, including the Director, Walter Beard.

8. Although I reviewed documents and data and interviewed Purchasing Department staff, I never discussed any aspect of my investigation with any of the Purchasing Department staff including its Director, Walter Beard.

9. At the conclusion of my investigation, I forwarded the results of my investigation to the Auditor General. I agreed with his recommendation that debarment proceedings should be commenced against AVE. My investigation was based solely upon facts and information gathered in an objective manner. No person influenced my investigation or recommendations in any manner or form whatsoever.

10. I prepared a letter to the Wayne County Board of Commissioners stating my recommendation that the County should initiate proceedings against AVE and its principals. After preparing the letter recommending debar ıent of AVE, the letter was discussed with Brendan Dunleavy and Thomas Naughton, Wayne County Chief Financial Officer. Walter Beard, Barry Alexander and other staff persons were present for that discussion. The discussion was about the content of my letter and the specifics of my investigation were not discussed at this meeting.

The foregoing statement is based upon my personal knowledge and if called to testify I could competently testify to all of this statement.

Dated: 4/22/02

/s/ Rosalyn D. Gibson
Rosalyn Gibson
Senior Principal Auditor

Subscribed and sworn to before me on
this 22 day of April, 2002.

Notary Public /s/
County of Wayne, State of Michigan
My Commission Expires 2-17-04

## APPENDIX E

## CHECK AND UNITED STATES DISTRICT COURT RECEIPT DATED FEBRUARY 7, 2008

[*Fold-out exhibit, next page*]

Huntington

View Front | View Back | Close

CAROL KIRKLAND
OTIS KIRKLAND
47305 SUNNYBROOK LN.
NOVI, MI 48374

01-05

871

Date 2-7-08

Pay to the Order of US District Court

$ 455 00

Four Hundred fifty-five and 00/100 Dollars

Huntington
huntington.com

For Appeal

Carol Kirkland

Thu Feb 7 14:49:51 2008

UNITED STATES DISTRICT COURT

DETROIT MI

Document No. 2:06-cv-12465
Comment brief

Check Number 871

Job Code Div NO
4:039 2

| Sub Acct | Type | Vendor | Amount |
|---|---|---|---|
| 1:1963980 | F | 2 | 105.00 |
| 2:5161696 | N | 2 | 150.00 |
| 3:9866486 | N | 2 | 200.00 |

Total Amount $ 455.00

CAROL KIRKLAND

AUTHORIZED BY GENERAL 06-10098A COX

Thu Feb 7 14:49:51 2008

Check No. 871
Amount $ 455.00
Pay Any Federal Reserve Bank or
General Depositary for credit to
United States Treasury Symbol No. 9